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No. A-670

Supreme Court of the United States

APRIL TERM, 1985

HAROLD A. BEDAT, et. als.
Petitioners

vs.

McLEAN TRUCKING COMPANY, et. als.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it violates the Due Process clause of the Fifth Amendment of the U.S. Constitution to terminate a pending case by the retroactive application of a newly adopted statute of limitations where the action was timely under existing law at the time it was instituted?

2. Whether DelCostello is to be applied retroactively to a § 301 hybrid action without an analysis of the factors of Chevron Oil Co. v. Huson?

3. If Chevron Oil Co. v. Huson is applicable, whether this case requires an exception to the retroactive application of DelCostello?

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit appears in the Appendix hereto. The opinion is unreported and unpublished. Judgment was entered on December 14, 1984.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 14, 1984.

This Court's jursidiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 29:

§160(b) Complaint and notice of hearing; answer; court rules of evidence applicable.

....PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

UNITED STATES CODE, TITLE 29:

§185(a) Suit by and against labor organizations, venue, amount, and citizenship.

(a) Suit for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court

of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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STATEMENT OF THE CASE

Plaintiffs are thirteen employees of McLean Trucking Company who brought an action in the Federal District Court in Connecticut under the jurisdiction of §301 of the Labor Management Relations Act (29 U.S.C. §185) for breach of a collective bargaining contract between McLean and the defendant Teamsters Union Locals 191 and 677, and breach of the duty of fair representation by the Locals.

The within action was initially filed on June 13, 1980, and amended complaints were filed on September 3, 1980 and September 2, 1981.

Plaintiffs contend that as former employees of ONC Trucking Company, they were entitled to be dovetailed in seniority with McLean employees when McLean purchased certain operations and assets of ONC Trucking Company, and that the defendants, in

breach of contract obligations and the duty of fair representation, entailed ONC employees rather than dovetailing them, with the result that ONC employees were given the lowest seniority and lost substantial wages and benefits thereby.

McLean filed a Motion to Dismiss on September 8, 1980, which was granted by Magistrate Arthur Latimer on June 2, 1981, based on this Court's opinion in United Parcel Service, Inc., v. Mitchell, 451 U.S. 56 (1981). The Magistrate's opinion was approved and adopted by the District Court (Burns, J.) on August 25, 1981. The Court granted leave to file an amended complaint and McLean moved to dismiss the Second Amended Complaint on grounds of the statute of limitations of 9 U.S.C. §12 and/or §52-420 of the Connecticut General Statutes. On June 8, 1983, the DelCostello case was issued. By motion of July 5, 1983 McLean sought to dismiss based on DelCostello. On July 12,

1983, the union first filed a Motion to Dismiss based on DelCostello.

On February 8, 1984 Magistrate Latimer granted all defendants' Motions to Dismiss based on DelCostello, and on May 24, 1984 Judgment was entered for defendants.

Plaintiffs appealed from the Judgment of the District Court contending that DelCostello should not have been applied retroactively to this case and that filing of unfair labor charges before the National Labor Relations Board should have tolled the six-month statute under 29 U.S.C. §160.

The Second Circuit filed an informal opinion on December 14, 1984 affirming the District Court and holding that "the six-month Statute of Limitations set forth in DelCostello applies retroactively to all 'claims under Section 301.'"

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals found without merit the argument that the application of a shortened statute of limitations to bar a claim which was timely under prior law raised significant constitutional issues under the Fifth Amendment of the United States Constitution. When this action was filed on June 13, 1980, the decision in Abrams v. Carrier Corp. 434 F.2d 1234, 1253 (2nd Cir. 1970) represented clear authority in the Second Circuit that the applicable statute of limitations period for §301 hybrid actions was the period for an action upon a contractual obligation or liability, that the same statute governed both the action against the employer and the labor representative.

The United States Supreme Court has often cast doubt on the constitutionality

of legislation shortening statutes of limitations without giving reasonable opportunity for litigants to press existing or pending claims. In the often-cited decision of Sohn v. Waterson 17 Wall 596 (84 U.S. 1873) Justice Bradley stated at p. 599:

> "A statute of limitations may undoubtedly have effect upon actions which have already accrued as well as upon actions which accrue after its passage. Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom. When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional. To avoid such a result, and to give the statute a construction that will enable it to stand, courts have given it a

prospective operation. In doing this, three different modes have been adopted by different courts. One is to make the statute apply only to causes of action arising after its passage. But as this construction leaves all actions existing at the passage of the act, without any limitation at all (which, it is presumed, could not have been intended), another rule adopted is, to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires -- which reasonable time is to be estimated by the court -- leaving all other actions accruing prior to the Statute unaffected by it. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or, as to them, is unconstitutional, as is a more arbitrary rule than the first. A third construction is that which was adopted by the Court below in this case, and which we regard as much more sound than either of the others (citing C.J. Taney, in Lewis v. Lewis, 7 Harvard 778). 'Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature

has otherwise provided.'"

In a decision upholding a state reduction of the limitations period for suits by municipal bond holders, Koshkonong v. Burton 104 U.S. 668 (1881) at 675, the opinion states:

> "It was undoubtedly within the constitutional power of the legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration be given by the new law for the commencement of an action before the bar takes effect."

Sohn v. Waterson, supra, was cited with approval by the Supreme Court as late as 1953 in United States v. Lindsey, 346 U.S. 568, 570.

The difficulty herein is that the triple barrage of United Parcel Service,

Inc. v. Mitchell, 451 U.S. 56 (April 20, 1981); DelCostello v. International Brotherhood of Teamsters, 462 U.S. 101, 103 S.Ct. 2281, 76 L.Ed.2d. 476 (1983); and Welyczko v. U.S. Air, Inc. 733 F.2d 239 (2nd Cir, 1984) left plaintiffs no time whatsoever, let alone a reasonable time since pending actions were summarily dismissed.

If it be argued that the Sohn case and its progeny protect only against State infringements under the obligation of contract clause of the U.S. Constitution, other cases extend the principle to the federal leval within the ambit of the Due Process clause of the Fifth Amendment. See Lynch v. United States, 292 U.S. 571, 580 (1933):

> "Contracts between individuals or corporations are impaired within the meaning of the constitution whenever the right to enforce them by legal process is taken away or materially lessened."

In a case upholding a federal statute shortening the time required for application for citizenship to seven years after declaration, the Supreme Court stated in United States v. Morena, 245 U.S. 392 at 397 (1917):

> "A limitation of time even upon the assertion of a right therefore having no limitation upon its assertion, or a different limitation, is not infrequent, and its legality is unquestionable if a time reasonable, in view of the subject matter, be given."

An extensive discussion of the Sohn decision is contained in Union Pacific RR v. Laramie Stockyards, 231 U.S. 200 (1913). The Supreme Court in Herrick v. Boquilles Cattle Co, 200 U.S. 96, 102 (1905) noted that a suit pending at the time a ten-year statute took effect could not be barred by retrospective application of the statute, citing Vreeland v. Town of Bergen, 34 N.J. Law 438. See also W.E. Wortham Co.

v. Thomas, 292 U.S. 426, 433 (1934) per J. Hughes:

> "But we also held that this essential reserved power of the State must be constured in harmony with the fair intent of the constitutional limitation, and that this principle precluded a construction which would permit the state to adopt as its policy the repatriation of debts or the destruction or the denial of the means to enforce them."

In Terry v. Anderson, 95 U.S. 628, 632 (1877), Chief Justice Waite wrote:

> "This court has often decided that statutes of limitations affecting existing rights are not unconstitutional if a reasonable time is given for the enforcement of the action before bar takes effect."

In Canadian Northern Reg. Co. v. Eggen, 252 U.S. 547, 562 (1920) the Supreme Court opinion stated:

> "This is the principle on which this court has repeatedly ruled that contracts were not impaired in a constitutional sense by change in limitations statutes which reduce the time for commencing actions upon them, provided a reasonable time was

> given for commencing suit before the new bar took effect. Sohn v. Waterson, 17 Wall 596, Terry v. Anderson 95 U.S. 628, 632, Tennessee v. Sneed, 96 U.S. 69, 74, Antoni v. Greenhow 107 U.S. 769, 774."

Judge Robert Zampano of the Federal District Court for the District of Connecticut dealt with this principle in Ferguson v. Sturm Ruger & Co., Inc. 524 F.Supp 1042, 1045 (1981) interpreting a Connecticut Statute stating:

> "To the extent an act amends a statute of limitations so as to bar accrued causes of action which were not barred by the previous statute it is unconstitutional, Sohn v. Waterson, 84 U.S. (17 Wall) 596, 599 ....The provision here in question did not allow for any 'grace period' which could save it from the proscription of this doctrine."

If Congress were to enact a six-month statute of limitations for §301 actions and to bar pending actions previorsly governed by applicable state statutes of limitations, could such action

pass constitutional muster under the foregoing authorities? It seems likely that this court would imply a grace period in order to prevent the statute from operating retrospectively to bar pending claims. The federal courts have been left to administer an area of law through action which resembles the legislative function. Congress never placed a limitation on §301 actions, but the performance of that function resembles a legislative act.

Whether the imposition of a limitations period to §301 actions be viewed as a legislative or a judicial function, can the constitutional problem dealt with so carefully by this Court be dealt with differently because the courts, rather than Congress, are left to fashion the applicable law?

II

There is a conflict in the circuits. Although most circuits, including the Second Circuit, apply DelCostello retroactively,

the 9th Circuit does not. Edwards v. Teamsters Local 36, 719 F.2d 1036, 1040-1041 (9th Cir, 1983), cert. denied ___ U.S. ____ 104 S.Ct. 1599, 80 L.Ed.2d. 130 (1984) Barina v. Gulf Trading and Transportation Co., 726 F.2d 560, 562-63 (9th Cir., 1984); Scoggins v. Boeing Co., Inc. 742 F.2d 1255 (9th Cir, 1984).

Additionally, the Second Circuit held in Welyczko v. U.S. Air, Inc., 733 F.2d 239 (2nd Cir. 1984) that DelCostello did not require the application of Chevron Oil Co., v. Huson. The Sixth Circuit held to the contrary in Pitts v. Frito-Lay, Inc. 700 F.2d 330 (6th Cir, 1983).

The First Circuit applied the Chevron tests adversely to the plaintiff but noted that the cause of action accrued in November of 1982. DelCostello was decided June 9, 1983 and suit was brought thereafter on July 15, 1983. Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir, 1984).

The Third Circuit applied the Chevron tests adversely to plaintiff, noting that the action had been brought on September 18, 1981 after the decision in United Parcel Service v. Mitchell on April 20, 1981 and noting also that there was no clear precedent that the plaintiff could rely on. Perez v. Dana Corporation, Parash Frame Div. 718 F.2d 581, 587-588 (3rd Cir, 1983).

The Fourth Circuit in Murray v. Branch Motor Express Company, 723 F.2d 1146, contained no discussion of past precedent in the circuit, referred to a chaotic development of law in the area, and applied Chevron adversely to a plaintiff who sued on September 13, 1978, some 29 months after accrual of the cause of action. However, the Federal District Court opinion in DelCostello v. International Brotherhood of Teamsters, 524 F.Supp. 721 aff'd. 679 F.2d 279 applied the Chevron tests adversely to plaintiffs in applying

United Parcel Service, Inc., v. Mitchell retroactively. The District Court described the unpublished decision of Kennedy v. Wheeling Pittsburgh Steel Corp., 81 LRRM 2349 (4th Cir. 1973) as not "addressing the question decided in Mitchell", since Kennedy did not deal with arbitration.

The Fifth Circuit appears to be consistent with the Second Circuit in applying DelCostello retroactively to all hybrid cases regardless of a Chevron Oil analysis. Edwards v. Sea Land Service, Inc. 720 F.2d 857 (5th Cir. 1983), Gray v. Meatcutters, ___ F.2d ___, 116 LRRM, 3173, 3174 (5th Cir, 1984).

The Seventh Circuit applied DelCostello retroactively to a suit begun April 9, 1982, the cause of action having occurred May 13, 1981. Ernst v. Indiana Bell Telephone Co., 717 F.2d 1036 (7th Cir. 1983). It would appear that the 7th Circuit joins the "all cases" approach of the Second

and Fifth Circuits. The Eighth Circuit applied Chevron adversely to a plaintiff who sued June 8, 1982, noting since United Parcel Serv. Service, Inc. v. Mitchell presaged DelCostello, thus there was no clear break with past precedent. Lincoln v. District 9 of I.A.M. 723 F.2d 627, 630 (8th Cir, 1983). See also Aarsvold v. Greyhound Lines, Inc. 724 F.2d 72 (8th Cir, 1983).

The Eleventh Circuit applied DelCostello retroactively without discussing Chevron, Rogers v. Lockheed - Georgia Co., 720 F.2d 1247, 1249 (11th Cir, 1983).

If Chevron is to stand it amounts to quite a strain to find that the case does not apply to these facts. In Chevron, while the plaintiff's case was pending, the Supreme Court decided Rodrigue v. Aetna Casualty & Surety, 395 U.S. 352, which held that the statute of limitations applicable to an action for injuries under the Lands Act was

the shorter state statute, rather than the longer federal period relied on by plaintiff. The oft-cited three factors of Chevron militate in plaintiff's favor herein. First either Mitchell or DelCostello or the two cases combined represented a clear break from the Abrams case in the Second Circuit.

Secondly, looking to purpose and effect, it is argued that if cases brought prior to United Parcel Service, Inc. v. Mitchell in timely reliance on clear precedent in their circuit are allowed to proceed, no damage will be done tothe rule of uniformity.

Third, as in the Chevron case "retroactive application of the (shorter) statute of limitations to this case would deprive the respondent of any remedy whatsoever or the basis of superceding legal doctrine that was quite unforseeable." 404 U.S. at 96.

As stated by the Chevron Court "non

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retroactive application here simply preserves his right to a day in Court." (404 U.S. p. 96).

III

Whether, as maintained by the Second Circuit in Welyczko, the Supreme Court in DelCostello intended to dispense with its tests under Chevron Oil Co. v. Huson for §301 hybrid action, raises an important question of federal law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

Ernest C. LaFollette, Esq.
Of Counsel,
Thomas Twist, Esq.
Counsel for Petitioner

March 12, 1985

A P P E N D I X

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of December one thousand nine hundred and eighty four.

Present: HONORABLE IRVING R. KAUFMAN,

HONORABLE WILLIAM H. TIMBERS,

HONORABLE MAX ROSENN,*

Circuit Judges.

HAROLD A. BEDAT, JOHN BENEVENTO, MICHAEL VARGA, RICHARD NOEL, WILLIAM P. DENSMORE, CHESTER BARTNIKOVSKI, WILLIAM BURNETT, THOMAS H. BYRON, ROBERT FLORA, ROBERT STEFURAK, PETER MOISAN, JOHN MIKLUS, and ANTHONY ESPOSITO,

Plaintiffs-Appellants,

-against-

McLEAN TRUCKING COMPANY, LOCAL 191-INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and LOCAL 677- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants-Appellees.

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* Senior Circuit Judge, U.S. Court of Appeals for the Third Circuit, sitting by designation.

Docket Number: 84-7507

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Bedat, et al (Bedat) asserts that the district court improperly dismissed his complaint as time barred. In DelCostello v. International Brotherhood of Teamsters, 462 U.S. 101 (1983), the Supreme Court established a six-month statute of limita-

tions for claims brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (a). The "federal policies at stake and the practicalities of litigation" demanded such a uniform federal limitations standard. Id. The six-month statute of limitations set forth in DelCostello applies retroactively to all "claims under Section 301." Welyczko v. U.S. Air, Inc., 733 F.2d 239, 241 (2d Cir. 1984); see also Assad v. Mt. Sinai Hospital, 725 F.2d 837 (2nd Cir. 1984); Edwards v. Sea Land Service, Inc., 720 F.2d 857 (5th Cir. 1983). Because Bedat's complaint was filed eight months after the New England Joint Area Conference Committee determined that Bedat was "not entitled to dovetail seniority rights," the district court's dismissal was proper under DelCostello. See Welyzcko, supra, 733 F.2d at 241.

2. Bedat claims that, in any event, his complaint was filed within the

six-month statute of limitations mandated by DelCostello. He urges that the statute should have been tolled when he filed and pursued charges with the National Labor Relations Board (NLRB). Where the same factual circumstances give rise to two separate and independent avenues of relief, the pursuit of one statutory remedy will not toll the statute of limitations for the for the other cause of action. See International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976); Johnson v. Railway Express Agency, 421 U.S. 454 (1975). Actions brought pursuant to Section 301 are wholly distinct from claims filed with the NLRB. See Vaca v. Sipes, 386 U.S. 171, 182-82 n.8 (1967). Accordingly, the filing of unfair labor practice charges with the NLRB will not toll the running of the statute of limitations on a Section 301 claim. See Aarsvold v. Greyhound Lines, Inc., 724 F.2d 72 (8th Cir.

1983); Nicely v. United States Steel Corp. 574 F.Supp. 184, 187-88 (W.D. Pa. 1983). Moreover, even if it were assumed that DelCostello's six-month statute of limitations was tolled during the pendency of the NLRB action, Bedat's filing of this Section 301 suit on June 13, 1980 was still untimely.

3. Bedat's other claims are similarly without merit.

4. Accordingly, the judgment of the district court is affirmed.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN

/s/ William H. Timbers
WILLIAM H. TIMBERS,

/s/ Max Rosenn
MAX ROSENN,
Circuit Judges

(2)

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Supreme Court of the United States

April Term, 1985

HAROLD A. BEDAT, et als.

Petitioners

vs.

McLEAN TRUCKING COMPANY, et als.

Respondents

Appendix-

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HAROLD A. BEDAT, ET AL, Plaintiffs VS. MC LEAN TRUCKING COMPANY, ET AL, Defendants	CIVIL NO. B-80-298

RULING ON MOTIONS TO DISMISS

This is an action for equitable relief and damages under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, brought by thirteen employees of McLean Trucking Company (McLean) against their employer for breach of a collective bargaining agreement, and against their unions, Locals 191 and 677 of the International Brotherhood of Teamsters, for breach of the duty of fair representation. All defendants have moved to dismiss, asserting that plaintiffs' claims are barred by the statute

of limitations. Because plaintiffs patently began this suit after the applicable six-month limitations period had run, the action is indeed untimely and defendants' motions to dismiss are granted.

Plaintiffs essentially allege in their amended complaint that: (1) they were employees of a company purchased by defendant McLean on March 1, 1979; (2) under the collective bargaining agreement then in force between McLean and the defendant unions, plaintiffs, as employees of a purchased company, had the right to "follow their jobs with dovetail seniority"; (3) the collective bargaining agreement expired on March 31, 1979, the defendants negotiated a new agreement for the next three-year period which did not contain the "dovetail seniority" provision; and (4) defendants applied the new agreement to plaintiffs retroactively, treating them as new employees with no seniority rights or

EDITOR'S NOTE

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benefits. In an earlier pleading, plaintiffs had also alleged that: (1) on August 16, 1979, the New England Joint Area Conference Committee (Committee) heard their grievances and determined that they were not entitled to "dovetail seniority" rights; (2) the Committee's decision became final and binding; and (3) the unions allegedly refused to pursue plaintiffs' claims further. This court granted a motion to dismiss addressed to that earlier complaint, because under the reasoning of United Parcel Service, Inc., v. Mitchell, 451 U.S. 56 (1981), plaintiffs' claims against McLean appeared to be barred on limitations grounds. In UPS v. Mitchell, commencement of an employee's § 301 suit against the employer was held required within the extremely short state limitations periods for actions to vacate arbitration awards, 451 U.S. at 60-62, and the instant suit was not brought until June 13, 1980, eight months after the Committee's final

decision.

Plaintiffs then amended with leave of court, cf. Foman v. Davis, 371 U.S. 178, 182 (1962), seeking to avoid the effect of Mitchell by depicting their claim differently. In the pleading now under scrutiny, plaintiffs have eliminated all references to the Committee's hearing on August 16, 1979 and allege instead that Locals 191 and 677 either failed to file plaintiffs' grievances or failed to process them through arbitration. In the new complaint, plaintiffs emphasize that their claims have never been arbitrated, and characterize the unions' refusal to arbitrate as a "continuing violation of the applicable collective bargaining agreement." Through pending motions to dismiss, defendants continue to insist that the claims in suit, however characterized, remain untimely. The Supreme Court's most recent and authoritative assessment of limitations concepts in § 301 cases, in DelCostello v.

International Brotherhood of Teamsters, --- U.S. ---, 51 U.S.L.W. 4693 (1983), has vindicated defendants' position.

In UPS v. Mitchell, supra, the question posed was the best choice among various state limitations measures, by analogy, and the Court focused on arbitration-related provisions. In DelCostello, however, the Court finally adopted a uniform, federal statute of limitations -- the generally more liberal six-month period contained in § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b) -- to apply both to employee actions against employers and to fair representation suits against unions. Id. at 4698. Because the court abandoned the analogy between § 301 suits and suits to vacate arbitration awards, id, at 4697, whether an employee's claims were actually arbitrated is no longer important to the decision of which limitations period should apply. See, e.g., Assad v. Mount Sinai

Hospital, No. 82-7251, slip op. at 7472 (2 Cir. Jan. 3, 1984) (Assad II); see also Assad v. Mount Sinai Hospital, 703 F.2d 36 (2 Cir. 1983) (Assad I). Not suprisingly, the DelCostello holding has been applied to cases pending at the time the decision was published. See, e.g., Cossu v. United Steelworkers of America, Civil No. H-83-714 slip op. at 2 (D. Conn. Nov. 21, 1983).

Plaintiffs do not dispute that their action, even as refashioned in the current amended complaint, should be governed by the NLRA six-month limitations period. They do argue, however, that (1) their causes of action have not yet accrued, because the union's refusal to arbitrate is a continuing wrong; and (2) the statute should be tolled during the period in which they filed and pursued charges with the National Labor Relations Board (NLRB). Neither contention is correct.

Plaintiffs' continuing violation argu-

ment will not save their claims from the limitations bar. A cause of action normally accrues, and the statute of limitations correspondingly begins to run, on the date the plaintiff could first have successfully initiated suit based on that cause of action. Santos v. District Council of New York, 619 F.2d 963, 968-69 (2 Cir. 1980). According to plaintiffs' own present complaint, the defendant unions first breached their duty of fair representation when the new collective bargaining agreement took effect in April, 1979. It was then that Locals 191 and 677 assertedly applied the new agreement retroactively and refused to process plaintiffs' grievances. Upon defendants' first refusal to represent plaintiffs, suit could have been brought. A continuing refusal to process grievances does not constitute successive new breaches, entitling plaintiffs to sue at any time. Cf. Siegel Oil v. Gulf Oil Corp. 701 F.2d 149, 153 (Temp. Emerg. Ct.

of App. 1983) (gasoline supplier's continuing refusal to supply retailer does not constitute new cause of action each month). Were it otherwise, the limitations period would never expire on an employee's fair representation suit and the purpose behind the statute of limitations would be lost. Cf. Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. National Labor Relations Board, 362 U.S. 411, 424-25 (1960).

In support of the tolling argument, plaintiffs' counsel represents that charges were filed with the NLRB on October 29 and 30, 1979, with the NLRB then advising on December 13 and 17 that no complaints would issue. Counsel argues that the six-month statute should begin to run on the date the NLRB's decision not to prosecute then became final -- January 30, 1980. As at least two courts have persuasively reasoned, however, the statute of limitations for § 301 suits against employers and unions should not be

tolled during the period that NLRB charges are pending. See Nicely v. U.S. Steel Corp. 574 F. Supp. 184, 187-88 (W.D. Pa. 1983); Martin v. Adams Distribution Service, Inc., No. 83-0027-CV-W-3, 114 LRRM 3562 (W.D. Mo. September 30, 1983). A civil lawsuit under § 301 of the LMRA is wholly independent of and separate from NLRB proceedings under 29 U.S.C. § 160, may support different relief measures, and a plaintiff may of course pursue both courses simultaneously, Nicely, supra. Where two such distinct avenues for potentially quite different relief do exist, a plaintiff's pursuit of one need not and should not toll the limitations period for pursuit of the other. Cf. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460-66 (1975) (pursuit of Title VII claim before EEOC does not toll statute of limitations for § 1981 action). Hence, plaintiffs' initial resort to the NLRB with complaints of purported unfair labor

practices did not toll the statute of limitations for the present civil action under § 301 of the LMRA.

For the reasons set forth above, plaintiffs' claims against defendants McLean and Locals 191 and 677 are untimely, and the pending motions to dismiss are accordingly granted.

Dated at New Haven, Connecticut, this 8th day of February, 1984.

/s/ Arthur H. Latimer
ARTHUR H. LATIMER
UNITED STATES MAGISTRATE

May 22, 1984: The recommended ruling of the magistrate for the reasons set forth therein is hereby accepted and adopted over the objection of plaintiffs. SO ORDERED.

/s/ Peter C. Dorsey
Peter C. Dorsey, U.S.D.J.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

HAROLD A. BEDAT, ET AL	)	
	)	
VS.	)	CIVIL B-80-298 PCD
	)	
MC LEAN TRUCKING COMPANY, ET AL	)	

JUDGMENT

This cause came on for consideration on the defendants' motions to dismiss by the Honorable Arthur H. Latimer, United States Magistrate, and the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the defendant's motions and all the papers submitted in connection therewith, filed its Ruling on Motions to Dismiss dismissing the complaint,

It is therefore ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered for the defendants and the complaint is dismissed.

Dated at Hartford, Connecticut, this

24th day of May 1984.

SYLVESTER A. MARKOWSKI,
Clerk

BY /s/ Dennis P. Iavarone
Dennis P. Iavarone
Deputy-in-Charge

Office - Supreme Court, U.S.
FILED
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CLERK

NO. 84-1455

IN THE

Supreme Court of the United States

APRIL TERM, 1985

HAROLD A. BEDAT, *et al.*,
Petitioners,

vs.

McLEAN TRUCKING COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the United States Supreme Court's decision in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. ——, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), which established a uniform six-month statute of limitations for claims arising under Section 301 of the Labor Management Relations Act, may be applied retroactively to actions pending on the date of that decision?

Parties

The defendants in this case are McLean Trucking Company, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina and with facilities in the state of Connecticut, and Locals 191 and 677 of the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America. The following 13 named plaintiffs were at all relevant times employees of the corporate defendant and members of the Union defendants: Harold A. Bedat, John Benevento, Michael Varga, Richard Noel, William P. Densmore, Chester Bartnikovski, William Burnett, Thomas H. Byron, Robert Flora, Robert Stefurak, Richard Moisan, John Miklus, and Anthony Esposito.

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NO. 84-1455

IN THE

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APRIL TERM, 1985

HAROLD A. BEDAT, *et al.*,

Petitioners,

vs.

McLEAN TRUCKING COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, McLean Trucking Company and Locals 191 and 677 of the International Brotherhood of Teamsters respectfully pray that the Petition for a Writ of Certiorari be denied.

Statement of the Case

The plaintiffs in this case are 13 employees of McLean Trucking Company ("McLean"), employed at its Stratford and Waterbury, Connecticut, terminals. They are repre-

sented for collective bargaining purposes by Locals 191 and 677 of the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America ("the Union"). In their Second Amended Complaint, the plaintiffs allege that prior to March 1, 1979, they were employees of the ONC Trucking Company. The plaintiffs further allege that, as of March 1, 1979, ONC Trucking Company was acquired by or merged into McLean, and that, in effect, the plaintiffs became employees of McLean and represented by the Union by that date.

The plaintiffs maintain that, by virtue of a collective bargaining agreement in effect between McLean and the Union on March 1, 1979, they were entitled to have their seniority with ONC Trucking Company credited toward McLean employment, and to be dovetailed into the McLean work force accordingly. The plaintiffs allege that, although they were initially dovetailed, they were subsequently denied their contractual right to dovetail seniority by retroactive application of a subsequently negotiated collective bargaining agreement between McLean and the Union, which became effective on April 1, 1979.

In their initial amended complaint, filed on September 3, 1980, the plaintiffs alleged that on August 16, 1979, the New England Joint Area Conference Committee heard their grievances concerning loss of seniority and determined that they were not entitled to dovetail seniority rights. These allegations were subsequently eliminated from the plaintiff's Second Amended Complaint, but were reasserted by the plaintiffs in their brief on appeal to the United States Court of Appeals for the Second Circuit. The plaintiffs also contended in their brief on appeal that the Union refused to take the arbitration decision of the New England Joint Area Conference Committee to a higher level on or about September 6, 1979.

By a Complaint filed on June 13, 1980, the plaintiffs brought this action against McLean and the Union pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185. In their undated Amended Complaint, filed on September 3, 1980, the plaintiffs allege that McLean and the Union breached a collective bargaining agreement by wrongfully denying them dovetail seniority rights, and that the Union also breached its duty of fair representation toward them. In addition to a claim for monetary damages against the defendants, the plaintiffs sought equitable relief, including an order vacating the arbitration award issued by the New England Joint Area Conference Committee denying the plaintiffs' grievances concerning loss of seniority.

McLean filed a Motion to Dismiss on September 8, 1980, seeking, *inter alia,* to dismiss that portion of the plaintiffs' Complaint which would require the court to vacate the arbitration award of the New England Joint Area Conference Committee, for the reason that the court lacked jurisdiction to vacate the arbitration award, and for the further reason that the plaintiffs had failed to take action to vacate the arbitration award within three months after the filing or delivery of the award. Based on the reasoning of the Supreme Court in *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981), the United States Magistrate (Latimer, Mag.) granted McLean's Motion to Dismiss by a Memorandum of Decision dated June 2, 1981, finding that the plaintiffs' Section 301 action had not been timely filed. The Magistrate's decision was approved and adopted by the District Court (Burns, J.), in a ruling dated August 25, 1981.

The plaintiffs then filed a motion, dated September 2, 1981, requesting leave of the court to file an Amended Complaint. In an effort to avoid the adverse impact of

the Supreme Court's decision in *United Parcel Service, Inc.* v. *Mitchell, supra,* the plaintiffs' Second Amended Complaint deleted references to the New England Joint Area Conference Committee's "final and binding" arbitration award, along with the request that the court vacate that award. Instead, the plaintiffs alleged in their Second Amended Complaint that the Union failed to file and process grievances to protect the plaintiffs' seniority, and that as a consequence, the plaintiffs' grievances were never arbitrated. Despite objections by both McLean and the Union, the plaintiffs' Motion to Amend their Complaint was granted by the United States Magistrate (Latimer, Mag.) on March 24, 1982, and was approved by the District Court (Burns, J.) on April 19, 1982.

By a Motion to Dismiss dated July 28, 1982, McLean sought dismissal of the Second Amended Complaint on the grounds that the claims set forth in that Complaint were barred by the statute of limitations set forth in 9 U.S.C. §12 and/or Section 52-420 of the Connecticut General Statutes. On June 8, 1983, while this Motion to Dismiss was still pending, the United States Supreme Court issued its decision in *DelCostello* v. *International Brotherhood of Teamsters,* 462 U.S. ——, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), holding that the six-month limitation period set forth in Section 10(b) of the LMRA, 29 U.S.C. Section 160(b), governed hybrid Section 301/unfair representation suits. Accordingly, by Motions to Dismiss dated July 5, 1983, and July 12, 1983, respectively, both McLean and the Union again sought the dismissal of the plaintiffs' Second Amended Complaint, this time for the reason that the plaintiffs' claims were barred by the six-month limitations period established by the Supreme Court in *DelCostello.*

On February 8, 1984, the United States Magistrate (Latimer, Mag.) granted the defendants' Motions to Dismiss, finding that the plaintiff's claims were barred by the six-month limitations period set forth in Section 10(b) of the LMRA. The District Court (Dorsey, J.) accepted and adopted the Magistrate's ruling, over objection of the plaintiffs, on May 22, 1984. Judgment was entered for both defendants on May 24, 1984.

The plaintiffs appealed from the judgment of the District Court, claiming that the court erred in dismissing their Complaint. Specifically, the plaintiffs argued that the District Court should not have applied *DelCostello* retroactivley, and that certain proceedings before the National Labor Relations Board operated to toll the relevant statute of limitations, so that their Complaint was not time-barred in any event.[1] In an informal opinion dated December 14, 1984, the United States Court of Appeals for the Second Circuit rejected the plaintiffs' arguments and affirmed the judgment of the district court.

Summary of Argument

Certiorari should be denied. The *DelCostello* court itself gave retroactive effect to its holding that the six-month limitations period set forth in Section 10(b) of the LMRA governs hybrid Section 301/unfair representation cases. The Second Circuit, in holding that *DelCostello* applies retroactively in this case, properly deferred to this Court's implicit position on the retroactivity issue. Although the Second Circuit has not analyzed *DelCostello* in the light of

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[1] The plaintiffs are not pursuing their tolling argument on this appeal.

the three-factor test for retroactivity set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), it is nonetheless clear that the *Chevron Oil* analysis favors retroactive application of *DelCostello*. In addition, the Second Circuit's decision in this case is supported by decisions from *all* of the Courts of Appeal which have considered this issue, including the Court of Appeals for the Ninth Circuit.

Although the decisions from the Court of Appeals for the Ninth Circuit on the issue of retroactivity are not entirely consistent with the decisions from the other Courts of Appeal which have considered the issue, recent decisions in the Ninth Circuit have given *DelCostello* retroactive effect. Accordingly, it cannot be argued that a real and embarrassing conflict among the circuits exists. Moreover, the present petition does not present for review an issue of substantial public importance. The additional fact that all of the Circuits would apply *DelCostello* retroactively under the circumstances present in this case also militates against Supreme Court review of the decision of the Court of Appeals.

Finally, and despite the plaintiffs' protestations to the contrary, no constitutional issues are raised by the Second Circuit's retroactive application of *DelCostello*. Accordingly, there is no basis for Supreme Court review of this case.

ARGUMENT

I. The Court of Appeals' retroactive application of the Supreme Court's decision in *DelCostello* v. *International Brotherhood of Teamsters* was proper.

It has long been a principle of general application that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). As the Court of Appeals for the Second Circuit has recently observed, "the general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect." *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786 (2nd Cir. 1980), *aff'd*, 456 U.S. 461 (1982) (quoting *National Association of Broadcasters* v. *F.C.C.*, 554 F.2d 1118 (D.C. Cir. 1976)). Indeed, until 1965, when this Court established that "we are neither required to apply, nor prohibited from applying, a decision retrospectively," an "absolute rule of retroaction" was widely assumed to exist. *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965).

In the present case, the plaintiffs' cause of action accrued no later than September 6, 1979. The plaintiffs filed their original Complaint in this action on or about June 13, 1980, some nine months later. The District Court dismissed the plaintiffs' Complaint as time-barred, relying on the Supreme Court's decision on *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. ——, 76 L. Ed. 2d 476 (1983). On appeal, the plaintiffs argued that at the time their cause of action accrued in 1979, the courts

had given no indication that a limitations period shorter than the relevant state statute of limitations governing contract actions would be applied to hybrid Section 301/unfair representation claims, and, therefore, that it would be inequitable to apply the six-month period established in *DelCostello* to their claims.[2] The plaintiffs maintained that an exception to the general rule favoring retroactivity should be made in this case, arguing that a non-retroactive application of *DelCostello* was mandated under the three-factor test articulated by this Court in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971).

The Court of Appeals rejected the plaintiffs' arguments and affirmed the District Court's judgment, relying on its earlier decision in *Welyczko* v. *U.S. Air, Inc.,* 733 F.2d 239 (2nd Cir. 1984). In *Welyczko,* the only issue presented for review was whether *DelCostello* was properly given retroactive application by the lower court in dismissing the plaintiffs' hybrid wrongful discharge/unfair representation claim.[3] Significantly, the plaintiff's cause of action in *Welyczko* accrued in 1975. 733 F.2d at 240. Thus, the same considerations raised by the plaintiffs in this case

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[2] Presumably, the plaintiffs would urge the court to adopt either Connecticut's six-year statute of limitations for actions founded upon written contracts, Conn. Gen. Stat. §52-576, or, alternatively, the three-year statute of limtations for actions oral contracts, Conn. Gen. Stat. §52-581.

[3] The plaintiff's claim in *Welyczko* arose under the Railway Labor Act, 45 U.S.C. §151 *et seq.,* which governs air carriers in lieu of the LMRA. The *Welyczko* court, however, regarded this as a distinction "without import," stating that "the same policies which lead the Supreme Court to apply a federal statute of limitations to claims under §301 of the Labor Management Relations Act apply with equal force to substantially identical claims under the Railway Labor Act." 733 F.2d at 240.

with respect to the claim that *DelCostello* was not "foreshadowed" by earlier decisions were present in *Welyczko*. The *Welyczko* court nonetheless held that the District Court's retroactive application of *DelCostello* to dismiss the plaintiff's claims was proper.

In reaching its decision to apply the *DelCostello* holding both retroactively and prospectively to hybrid Section 301/unfair representation claims, the *Welyczko* court specifically declined to use the *Chevron Oil* test to determine if non-retroactive application was warranted. 733 F.2d at 241. Rather, the *Welyczko* court deferred to this Court's implicit decree in *DelCostello* that that decision was to be given retroactive effect:

> The Supreme Court not only adopted a new statute of limitations in *DelCostello*; it applied that time bar retroactively to govern the very claim at issue in the case before it. We have noted that "the Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar." *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2nd Cir. 1977). Thus, when that court itself has given retrospective application to a newly-adopted principle, "no sound reason exists for not doing so here." *Holzsager* v. *Valley Hospital*, 646 F.2d 792, 797 (2nd Cir. 1981). A Court of Appeals must defer to the Supreme Court's directive on this issue, explicit or implicit. See *United States* v. *Fitzgerald, supra* at 582. Certainly, its intended application is clear in this case.

Id. See DelCostello, supra at ——, 76 L. Ed. 2d at 494 (reversing Second Circuit's decision in *Flowers* v. *Local 2602, United Steelworkers of America*, 671 F.2d 87 (2nd Cir. 1982), and holding that six-month limitations period

set forth in Section 10(b) of the LMRA governs action filed in January, 1979).[4] The Second Circuit's decision to give *DelCostello* retroactive application, both in *Welyczko* and in the present case, is thus entirely consistent with this Court's decision in *DelCostello* to apply its holding retroactively to one of the two consolidated cases decided by that opinion.

It should be noted, however, that even if the Second Circuit favored analysis of *DelCostello* under the three-factor test enunciated in *Chevron Oil Co.* v. *Huson, supra.*, retroactive application of the *DelCostello* rule would nevertheless be appropriate under the facts of this case. It cannot, for example, be argued that *DelCostello* established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson, supra,* at 106. At the time the plaintiffs' cause of action had accrued, neither the Supreme Court's decision in *International Union* v. *Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), nor the Second Circuit's decision in *Abrams* v. *Carrier Corp.,* 434 F.2d 1234 (2nd Cir. 1970), had foreclosed the possibility that hybrid Section 301/unfair representation claims to vacate arbitration awards would be governed by a shorter statute of limitations than the six or three-year

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[4] It should also be noted that in *DelCostello* the District Court had considered whether this Court's decision in *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981), should be applied retoactively, and determined, through an examination of the *Chevron Oil* factors, that retroactive application of *Mitchell* was appropriate. 524 F.Supp. 721 (D. Md. 1981). The Fourth Circuit approved that decision without comment. 679 F.2d 879 (4th Cir. 1982). This Court, in turn, tacitly approved that conclusion.

limitations period for contract actions.[5] Indeed, at least two lower courts in the Second Circuit had held, prior to 1979, that the considerably shorter state statute of limitations governing appeals from arbitration awards would apply to such Section 301 claims.[6] *Wallace* v. *American Telephone and Telegraph Co., Inc.*, 460 F. Supp. 755, 758 (EDNY 1978); *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F. Supp. 1003, 1006 (WDNY 1976). These decisions were consistent with the Second Circuit's cautionary advice in *Abrams* that the applicable statute of limitations must be determined on a case-by-case basis. *Abrams* v. *Carrier Corp., supra,* at 1252 n.15. Moreover, as the Third Circuit observed in *Perez* v. *Dana Corp., Parrish Frame Division,* 718 F.2d 581 (3rd Cir. 1983), the case law in the Circuits "was confused and divided and thus provided no clear past precedent on which [the plaintiffs] could have relied." *Id.* at 587. Thus, when the plaintiffs' cause of action arose, there was no clear past precedent upon which they could reasonably have relied in waiting nine or more months to file their suit.

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[5] *Hoosier Cardinal* involved a straightforward breach of contract claim by a union against an employer under Section 301. In *Abrams,* the employees' wrongful discharge claim was not arbitrated, and, hence, was not analogous to an action to set aside an arbitration award. In the present case, the plaintiffs initially sought to vacate the New England Joint Area Conference Committee's arbitration award; despite deletion of this claim in the Second Amended Complaint, the plaintiffs' suit, if successful, would still have that direct effect. *See United Parcel Service* v. *Mitchell,* 451 U.S. 56, 61 (1981).

[6] Section 52-420 of the Connecticut General Statutes provides that an application to vacate, modify or correct an arbitration award must be made within 30 days from the notice of the award.

An examination of the second *Chevron Oil* factor also leads to the conclusion that retroactive application of the *DelCostello* rule is appropriate. By establishing a six-month statute of limitations derived from federal rather than state law, the *DelCostello* court was able to satisfy three important policy considerations: the need for uniformity in the treatment of similar claims, the desire "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights," and the need for a rule which assures "the relatively rapid final resolution of labor disputes." *DelCostello, supra* at ——, 76 L. Ed. 2d at 485-494. As the Eleventh Circuit has observed, "to apply . . . state statutes and deny retroactive application to *DelCostello* would retard rather than further the federal interests in prompt resolution of labor disputes, finality, and consistency embodied in *DelCostello.*" *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247, 1250 (11th Cir. 1983).

Finally, with respect to the third *Chevron Oil* factor, it is clear that the equities in the present case do not militate against retroactive application of *DelCostello.* Although the original Complaint in the present case was filed over four years ago, the District Court proceedings never advanced beyond consideration of the statute of limitations issue. Although the plaintiffs engaged in very limited discovery against the Union, it certainly cannot be said that the plaintiffs engaged in any intensive preparation of the merits of the case. As the First Circuit observed under similar circumstances, "plaintiff has been stopped before he could get started; he has not been deprived of a judgment obtained before *DelCostello* came down." *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819, 822 (1st Cir. 1984).

Given the Supreme Court's implicit decree that *DelCostello* should be applied retroactively, the Court of Appeals was not required to determine if the *Chevron Oil* test man-

dates a different result. Nevertheless, it is clear that an examination of *DelCostello* in the light of the *Chevron Oil* factors favors retroactive application of the *DelCostello* rule. Thus, the Court of Appeals properly affirmed the judgment of the District Court, and this Court should affirm the decision of the Court of Appeals.

II. There is not a substantial conflict among the circuits concerning the retroactive application of *DelCostello* which would warrant the granting of the plaintiff's petition.

The plaintiffs argue that there is a conflict among the Circuit Courts of Appeal concerning the retroactive application of *DelCostello.* Nine of the ten circuits which have considered the issue have unequivocally held that *DelCostello* should be given retroactive effect.[7] Until very recently, only the Ninth Circuit refused to apply *DelCostello* retroactively.[8]

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[7] *See, e.g. Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Circuit 1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2nd Cir. 1984); *Perez* v. *Dana Corp., Parrish Frame Division*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Jones* v. *Truck Drivers Local Union No. 299*, 748 F.2d 1083 (6th Cir. 1984); *Ernst* v. *Indiana Bell Telephone Company, Inc.*, 717 F.2d 1036 (7th Cir. 1983); *Lincoln* v. *International Association of Machinsts and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Rogers* v. *Lockheed-Georgia Company*, 720 F.2d 1247 (11th Cir. 1983).

[8] *See Scoggins* v. *Boeing Co., Inc.*, 742 F.2d 1225 (9th Cir. 1984); *Barina* v. *Gulf Trading and Transportation Co.*, 726 F.2d 560 (9th

(Footnote continued on following page)

In two recent cases, however, the Ninth Circuit has refused to adopt an absolute rule of non-retroactivity, and has permitted the retroactive application of the *DelCostello* rule where its affect would be to lengthen, rather than shorten, the applicable statute of limitations. *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447, 1451 (9th Cir. 1985); *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984).[9] Both *Aragon* and *Glover* involved hybrid Section 301 actions challenging the results of arbitration awards. In both cases, the applicable state statute of limitations governing actions to vacate arbitration awards was shorter than the six-month limitations period set forth in Section 10(b) of the LMRA. Accordingly, as no prejudice would result in either case from the application of the longer federal statute of limitations, the Ninth Circuit gave retroactive effect to *DelCostello* in both cases. *Aragon* v. *Federated Department Stores, Inc., supra* at 1453; *Glover* v. *United Grocers, Inc., supra* at 1382-1383.

Thus, all of the circuit courts which have faced the issue, including the Ninth Circuit, have determined that *DelCostello* may be given retroactive effect. It has long been the practice of this Court to deny certiorari "except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarras-

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Cir. 1984); *McNaughton* v. *Dillingham Corp.*, 722 F.2d 1459 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 259, 83 L. Ed. 2d 227 (1984); *Edwards* v. *Teamsters Local 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1599, 80 L. Ed. 2d 130 (1984).

[9] Neither of these cases are cited by the plaintiffs in their Petition.

sing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). While the Ninth Circuit's treatment of the retroactivity issue is somewhat anomalous, the decisions of that court of appeals certainly do not create a real and embarrassing conflict among the circuits.[10] This is particularly true in the present case, where it is clear that all of the circuit courts which have decided the issue would apply *DelCostello* retroactively, rather than apply the shorter state statute of limitations governing actions to set aside arbitration awards.[11]

Finally, it is clear that the present petition raises an issue of limited public importance. The number of cases which could be affected by a decision from this court concerning the retroactive application of the *DelCostello* rule is finite and steadily decreasing. Thus, even if the Ninth Circuit's treatment of the retroactivity issue may be regarded as creating a genuine conflict among the circuits, the impact of any resolution of that conflict is narrowly circumscribed. Thus, the present petition does not concern principles the settlement of which is of substantial importance to the public.

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[10] It should be noted that this Court has twice denied certiorari on this very issue in cases in which the Ninth Circuit declined to apply *DelCostello* retroactively. *See McNaughton* v. *Dillingham Corp., supra; Edwards* v. *Teamsters Local 36, supra.*

[11] *See* Discussion at pp. 10-11, *supra.*

III. The plaintiffs' petition does not present a Constitutional issue for the Court to determine.

The plaintiffs argue in their petition that the retroactive application of the *DelCostello* decision in this case raises significant constitutional issues under the Fifth Amendment of the United States Constitution. The plaintiff's position here is premised on the assumption that the six-month limitations period adopted in *DelCostello* is shorter than the state statute of limitations that would otherwise apply under the facts of this case. As the defendants have already pointed out, however, this assumption is not well-founded.[12] Accordingly, certiorari should be denied in this case even if there were a constitutional dimension to the retroactivity issue.

This court has repeatedly held, however, that "the constitution neither prohibits nor requires retrospective effect." *Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965). *See, e.g., United States* v. *Johnson,* 457 U.S. 537, 542 (1982); *Desist* v. *United States,* 394 U.S. 244, 248-249 (1969), *reh. denied,* 395 U.S. 931 (1969); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932); *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 455 (1923). As Justice Cardozo stated in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co., supra,* "we think the federal constitution has no voice upon the subject." *Id.* at 364. In fact, this Court has held that retroactive application of a judicial decision which changes existing law does not constitute an impairment of contract obligations or a denial of due process. *Tidal Oil Co.* v. *Flanagan, supra.* Thus, there is no constitutional dimension to the retroactivity issue, and certiorari should accordingly be denied.

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[12] *See* Discussion at pp. 10-11, *supra.*

CONCLUSION

For the foregoing reasons, the plaintiffs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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